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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2001

KATHLEEN KEARNEY, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

THOMAS E. WARNER
Solicitor General
Counsel of Record

JASON VAIL
Assistant Attorney General

Counsel for Petitioners

Office of the Attorney General
Suite PL-01
The Capitol
Tallahassee, FL 32399
(850)414-3300
(850)488-4872 (fax)

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QUESTION PRESENTED

In a would-be class action, the district court entered judgment in 1996 for the plaintiffs without entering a class certification order. Five years after entry of that final judgment, during an appeal of a contempt order, the court of appeals determined that an "implied" class existed and instructed the district court how to define it. The question presented is:

> Does Fed.R.Civ.P. 23, which requires class certification before a decision on the merits, permit the court to certify a class five years after entry of the final judgment in the absence of a formal prejudgment certification order?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Petitioner-defendants: Kathleen Kearney, secretary of the Florida Department of Children and Families; Charles Auslander, District 11 administrator, Florida Department of Children and Families; Carl Littlefield, assistant secretary, Florida Department of Children and Families; and. Robert Sharpe, Medicaid Director, Florida Agency for Health Care Administration.

Respondent-plaintiffs: the respondents appeared anonymously below. The petitioners have filed their names under seal.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, executive branch officials of the State of Florida, respectfully petition the Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 261 F.3d 1037, and is reproduced at petitioners' appendix A. The district court's final judgment is reproduced at petitioners' appendix B. Its order on contempt, which was the subject of the appeal, is

reproduced at petitioners' appendix C. The second order appealed, a post-judgment class certification order, is reproduced at petitioners' appendix D.

JURISDICTION

The court of appeals rendered its decision on August 14, 2001. Pet. App. A. This Court has jurisdiction under 28 U.S.C. s. 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed.R.Civ.P. 23 states in relevant part:

> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
>
> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
>
> ✦✦✦
>
> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

STATEMENT OF THE CASE

This is a would-be class action originally brought in March 1992 by 13 anonymous Medicaid-eligible individuals with developmental disabilities. The lawsuit was an attack on waiting lists for placement in intermediate care facilities for the developmentally disabled (ICF/DDs). ICF/DDs are residential treatment facilities that provide 24-hour care and services to severely disabled individuals with developmental disabilities. Pet. App. A p. 3 n. 1. ICF/DDs are funded through the joint federal-state Medicaid program. *Id.* The respondents contended that they were not being provided ICF/DD services with "reasonable promptness," as required by 42 U.S.C. s. 1396a(a)(8) and the Fourteenth Amendment to the Constitution. *Doe v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998) (*Does I*).

The petitioners are officials of the Department of Children and Families and the Agency for Health Care Administration, the two state agencies charged with administering ICF/DDs and Medicaid.

Class Certification Activity through *Does I*

In July 1992, the respondents moved for class certification. They sought certification of a class under Fed.R.Civ.P. 23(b)(2). The petitioners resisted the motion, and after a hearing, a magistrate judge recommended certification in a report and recommendation issued August 26, 1996. The magistrate judge did not specify the type of class for which he recommended approval.

On August 28, 1996, two days after publication of the report and recommendation, the district court, although knowing about the existence of the report and recommendation, entered a final judgment in the case without ruling on the motion for class certification. The final judgment was a terse, one-page document that said in relevant part:

> ORDERED AND ADJUDGED that Defendants shall, within 60 days of the date of this Order, establish within

> the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities. Jurisdiction is retained to enforce this order. Any pending motions are dismissed as moot.

Pet. App. B p. 49-50.

The record indicates that the district court *deliberately* did not enter a formal certification order. In January 1997, the petitioners moved to stay the effect of the final judgment pending appeal. Among other things, the petitioners protested the class-wide nature of the relief. They argued that such relief was inappropriate because no class had been certified, no class- or system-wide injury had been shown, and no actual injury to the named respondents had been demonstrated.

The district court dismissed these arguments, saying that class certification was not necessary:

> The finding, that this case is the type [which is] "capable of repetition yet evading review,' eliminated the need for a further finding of actual harm to the named plaintiffs *or a determination that this case should be certified as a class action.*

Emphasis added.

The petitioners appealed the final judgment, raising the lack of class certification, a point the court of appeals did not expressly address in its decision affirming the district court. *Does I* at 712, 722.

Post *Does I* Contempt Proceedings

On remand, the respondents filed several motions seeking contempt sanctions. At first, the district court denied them. However, in August 1998, the district court opted to treat the respondents' latest motion for contempt as a motion to show cause. The court held a hearing on November 4, 1998, on the motion. The court then found the petitioners had failed to comply with the final judgment. The district court refrained from finding the petitioners in contempt. Instead, the court

ordered them to take several remedial steps, including the filing of a plan "which identifies, locates and provides for the immediate delivery of services to the 600 persons the state has recognized as eligible for but not receiving services for the developmentally disabled.". Pet. Ap. 53. The petitioners filed their plan on January 11, 1999. Pet. App. A p. 5.

In May 1999, the court held a three-day hearing to determine whether the petitioners had complied with the judgment and to inquire into the details of the January plan. *Id.*

In October 1999, the court found the petitioners had failed to comply with the final judgment and held them in contempt. App. C. In passing, the district court recognized that it had failed to certify a class in the case. Pet. App. C. p. 56 n. 2. It sanctioned the petitioners $10,000/day until they complied with the judgment. Pet. App. C p. 65.

The petitioners appealed this order, in part arguing that the district court could not base a contempt finding on any purported failures to serve a "class" in the absence of a formal class certification order. Pet. App. A p. 16.

During the pendency of the contempt appeal, on February 11, 2000, sua sponte and without notice to the parties, the district court entered a belated class certification order. Pet. App. A p. 6. The district court was motivated by the petitioners' appeal of the contempt order, where they raised lack of class certification as a defense. *Id.* The petitioners appealed this belated order and the court of appeals consolidated both appeals.

Does II — The Decision of the Court of Appeals

On August 14, 2001, the court of appeals vacated the contempt order primarily on the ground that the alleged violations of the judgment were matters not within the scope of the final judgment. Pet. App. A. The court of appeals also vacated the belated class certification order on the ground that the district court lacked jurisdiction to enter it. *Id.* at 48.

However, the court of appeals held that an "implied" class existed. That is, the court of appeals ordered certification of a class despite the fact the district court never entered a formal prejudgment certification order as required by Fed.R.Civ.P. 23(c) and despite the fact that five years had now passed since entry of the final judgment. Pet. App. A pp. 16-22. The court of appeals also directed how that class should be defined:

> Medicaid eligible individuals with developmental disabilities who have requested, and have been determined eligible for, placement in an Intermediate Care Facility ("ICF/DD") but who have not received a placement with reasonable promptness.

Pet. App. A p. 22. "To keep the paper current, the district court should enter an order to that effect upon remand," the court of appeals said. *Id.* at 22.

Thus, while the petitioners won on all the contempt issues and obtained the vacation of the belated class certification order, they lost on the question whether a class would be "implied," or certified, post-judgment.[1]

REASONS FOR GRANTING THE PETITION

This case presents the question whether the plain text of Rule 23(c), which requires prejudgment class certification, and this Court's precedent permit *post*-judgment certification. The courts of appeals have split on this issue.

Much rides on the resolution of the question. As this Court has observed, postjudgment resolution of class certification motions is at odds with the rule's text, and allows litigants to

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[1] Because the court of appeals "implied" a class, the respondents have declared themselves prevailing parties in *Does II*, and have sought appellate attorneys' fees and costs under 42 U.S.C. s. 1988.

"game" the system: a party can obtain a ruling on a claim advanced on behalf of a class without having to satisfy Rule 23's rigorous requirements.[2] For instance, having seen which way the wind blows, individuals may opt out of the class if the result isn't to their liking.

Courts may approve certifications after judgment without making the findings of commonality, typicality, numerosity and adequacy of representation required by the rule. And they may do so in circumstances that preclude meaningful appellate review.

The failure to define a class before judgment in a would-be class action can make judgments perilously vague and defective — to the extent that they may be unenforceable. The failure to certify a class before judgment and to define the class in the judgment often leaves the parties guessing who benefits from relief imposed and the defendants bewildered over the scope of their obligations. Litigation over such vague judgments only increases the cost of litigation and the waste of the parties' and the courts' time and resources.

This Court must bring order to this confusion.

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Apparently feeling constrained by old precedent from the former Fifth Circuit, the court of appeals found that this case was a class action despite the lack of a class certification order entered before judgment on the merits and despite ample precedent from this court indicating that Fed.R.Civ.P. 23(c) does not allow "implied" class actions. Pet. App. A pp. 16-22.

Four decisions from this Court collectively stand for the proposition that a class cannot be certified after judgment on the

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[2] *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-178 (1974).

merits. Hence, one cannot "imply" the existence of a class, as the court of appeals did, in the absence of a prejudgment certification order.

The first case is *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). In *Eisen*, the issues were whether a class numbering perhaps 2.5 million people who could be identified with reasonable effort had to receive individual, rather than published, notice and who would pay for that notice. The district court decided that the defendants should pay, despite the general requirement in Rule 23 that the plaintiffs bear the cost of notice. The district court reached this decision after conducting a preliminary review of the merits and determining that the plaintiffs were likely to succeed with their lawsuit. Because the plaintiffs were likely to succeed, the district court decided it was fair to impose 90 percent of the cost of notice on the defendants. This Court, however, disagreed with the district court's approach, saying class certification determinations must precede any decision on the merits. The Court said that ruling on the merits before class certification "contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements of it. He [the plaintiff] is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action . . . .'" *Id.* at 177-178.

The second case is *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975). The *Jacobs* plaintiffs sought to enjoin enforcement of school regulations affecting the operation of their student newspaper, claiming violations of their constitutional rights. At oral argument, this Court learned that all the plaintiffs had graduated from school. There never was any formal class certification order entered in the case, nor was any effort made to identify

the class as contemplated by Rule 23(c)(1) or (3). The district court orally decided to certify a class (*id.* at 851) and mentioned class certification briefly in an "entry on motion for permanent injunction" (*Id.* at 850), but never entered a formal certification order. Because no class was properly certified, this Court held that the action was moot.

The third case is *Baxter v. Palmigiano*, 425 U.S. 308 (1976). The question of class certification arose in the Court's discussion of jurisdiction. *Id.* at 310 n. 1. The Court observed that while the district court had "treated the suit as a class action . . . [it] did not certify the action as a class action . . . Without such certification and identification of the class, the action is not properly a class action." *Id.*

The fourth case is *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). *Spangler* was a school desegregation case brought by children and their parents. The case had never been certified as a class action, although it had been filed as a would-be class action and "all the parties have until now treated it as a class action." *Id.* at 430. During the life of the case, the children grew up and graduated. This Court thus faced a mootness challenge. *Id.* This Court held that the absence of pre-judgment class certification deprived the children and parents of standing to continue litigating the action. Only the timely intervention of the United States prevented dismissal of the case as a whole. *Id. Cf. Board of Education of North Little Roc, Arkansas School District v. Davis*, 454 U.S. 904, 906 (1981) (Rehnquist J., dissenting to a denial of a petition for writ of certiorari) (questioning whether the federal courts had jurisdiction of this school desegregation case because there was "no remaining plaintiff with a stake in the outcome of the case, nor had there been any previous certification of a class action.").

These decisions are consistent with the plain text of Rule 23(c)(1) and (3), which require that class certification must take place, if at all, at or before final judgment on the merits. This Court has said that "actual, not presumed, conformance with

Rule 23(a) remains, however, indispensable." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). The same policy considerations behind *Falcon* and Rule 23(a) should apply to the timing of certification orders under Rule 23(c).

The decision below is inconsistent with these decisions because it allows post-judgment class certification by appellate fiat rather than by the measured application of the standards set out in Rule 23(b) and compliance with the text of Rule 23(c). And it permits plaintiffs to obtain a decision on the merits without having to satisfy the requirements of Rule 23.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

Despite *Eisen*, this Court's other precedent and Rule 23(c)'s unambiguous text, the circuit courts have taken divergent views on the question whether a class may be certified after judgment.

Some courts have held unequivocally that post-judgment class certification is impermissible. See *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (7th Cir. 1975); *Roberts v. American Airlines Inc.*, 526 F.2d 757 (7th Cir. 1975); and *International Union v. Donovan*, 746 F.2d 839 (D.C. Cir. 1984); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974). *Cf. Garrett v. City of Hamtramck*, 503 F.2d 1236, 1243-1246 (6th Cir. 1974) (court cannot alter or expand a class definition after the decision on the merits). The *Peritz* court was particularly strong in rejecting post-judgment certification, relying on *Eisen* and the plain text of Rule 23(c). *Id.*, 523 F.2d at 353-354.

Other courts have disapproved post-judgment certification. See *Rodriguez v. Banco Central*, 790 F.2d 172, 174-175 (1st Cir. 1986); *Nance v. Union Carbide*, 540 F.2d 718, 723 n. 9 (4th Cir. 1976) ("The language of Rule 23(c) makes it quite clear that the determination of class status is to be made 'before the decision on the merits.'").

However, some courts permit class certification after judgment even though Rule 23(c)'s plain language appears to prohibit it. See *Bing v. Roadway Express Inc.*, 485 F.2d 441 (5th Cir. 1973); *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir. 1977); *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979).

Uncritically following old Fifth Circuit precedent and making little effort to distinguish contrary cases from other circuits, the Eleventh Circuit joined the camp permitting post-judgment class certification without formal satisfaction of Rule 23's requirements. Pet. App. A pp. 18-23.

The issue in this case is of constitutional magnitude. Rule 23 is imbued with Article III case-or-controversy concerns. See *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (Rule 23 requirements must be interpreted in keeping with Article III constraints). Because the circuits have taken opposing views on what amounts to the Article III jurisdiction of federal courts to impose class relief, this Court should grant the petition to resolve this long-simmering conflict

III. THE ISSUE IS ONE OF NATIONAL IMPORTANCE.

This Court's review is essential to maintain the integrity and the uniform application of the Federal Rules of Civil Procedure. See *e.g., Schiavone v. Fortune*, 477 U.S. 21 (1986) (certiorari grant to review conflicting interpretations of the rules by the circuits).

Unless the Court steps in, the problems created by post-judgment class certification, which strike at the heart of the courts' Article III jurisdiction and the integrity of Rule 23, will recur — perhaps with greater frequency than they have in the past. The class action has become the preferred vehicle for seeking relief in a wide range of lawsuits, from institutional reform (of prisons, foster care, the delivery of services to

individuals with disabilities) to shareholder derivative and mass tort actions. Between 1996 and 2000, the number of class actions filed in the federal courts doubled — from 1,223 in 1996 to 2,419 in 2000. Pet. App. E p. 68. During the same period, total civil filings remained relatively constant, ranging from 257,000 to 273,000 cases. *Id.* Delays in class certification are a frequent problem,[3] and it is not uncommon for district courts to grant judgment without certifying the class. As the number of class action filings increase, the likelihood of post-judgment certifications increases.

Post-judgment certification and especially certification implied post-judgment by an appellate court present several significant problems.

First, as this Court observed in *Eisen*, post-merits class certification allows a plaintiff to obtain the benefits of a class action without having to satisfy Rule 23's rigorous requirements. *Eisen*, 417 U.S. at 177-178.

Second, post-judgment certification may allow district and appellate courts to certify classes without making the necessary findings of compliance with Rule 23's components: commonality, typicality of claims or defenses, numerosity and adequacy of the representative. Thus, a court may enter a post-judgment certification order even though class certification may be unwarranted. See *e.g., Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001) (class certification orders vacated because of lack of demonstrated typicality of claims by alleged representative plaintiffs).

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[3] See *Premier Electric Construction Co. v. National Electric Contractors Association Inc.*, 814 F.2d 358, 363 (7th Cir. 1987) ("Delay in certifying the class is regrettably frequent, even though appellate courts continually condemn the practice.").

Third, post-judgment certification may occur in circumstances that deny the parties of the ability to obtain meaningful appellate review of the certification decision. This is particularly true when an appellate court "implies" certification after judgment.

Fourth, the failure to require strict compliance with Rule 23(c) complicates litigation and drives up its cost. The failure to certify a class before judgment usually is accompanied by a failure to define the class in the judgment, as required by Rule 23(c)(3). The rule effectively entwines the class definition with, and in fact makes it a part of, the relief imposed. Would-be class action judgments which fail to comply with Rule 23(c)(3) thus may become inherently vague. The parties and the courts often have no firm idea who is entitled to benefit from the relief granted or to whom the defendants may owe obligations. Such vagueness provokes rather than ends litigation as the parties battle over clashing views of the meaning of the judgment and to whom it applies. This case is a prime example of how a vague judgment only stimulates further litigation, wasting the time and resources of the parties, the courts and the public.

Finally, the need for uniform rules governing the conduct of class action litigation is no less pressing than the need for uniform rules governing the tabulation of votes. See *e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000). Congress, in fact, has recognized the need for uniform rules of judicial procedure. The rules enabling act, 28 U.S.C. s. 2072(a), empowers this Court to adopt general rules applicable to Article III courts. The act's purpose is to ensure uniformity nationwide. See *Henderson v. U.S.*, 517 U.S. 654, 672 (1996) (Rule 4 provides a nationally uniform procedure for service of process); *Hanna v. Plummer*, 380 U.S. 460, 472 (1965). However, because of the divergent positions taken by the courts of appeals, that uniformity does not, and will not, exist in class action cases until this Court addresses the question presented in this case.

CONCLUSION

For these reasons, the Court should grant the petition.

RESPECTFULLY SUBMITTED,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

THOMAS E. WARNER
SOLICITOR GENERAL
Counsel of Record

JASON VAIL
Assistant Attorney General

Office of the Attorney General
Suite PL-01
The Capitol
Tallahassee, FL 32399
(850)414-3300
(850)488-4872 (fax)

Counsel for Petitioners

Dated November 7, 2001